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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. ESROM MADRID, Defendant and Appellant.	2d Crim. No. B210339 (Super. Ct. No. 1227073) (Santa Barbara County)

Esrom Madrid appeals a judgment after his conviction of carjacking (Pen. Code, § 215, subd. (a)),[1] second degree robbery (§ 211), assault on an officer with force likely to produce great bodily injury (§ 245, subd. (c)), attempted voluntary manslaughter (§ 664, 192, subd. (a)), and resisting an executive officer (§ 69). We conclude, among other things, that: 1) the court was not required to instruct the jury on the lesser-included offense of vehicular grand theft; 2) it was not required to instruct the jury on the lesser offense of simple assault on a peace officer (§ 241, subd. (c)); 3) substantial evidence supports the finding that Madrid intended to kill police officers; and 4) the court did not err by finding that there was no relevant evidence from police personnel records after an in camera review on Madrid's *Pitchess* motion. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531.) We affirm.

[1] All statutory references are to the Penal Code.

FACTS

On March 15, 2007, Salvador Dominguez drove his car to pick up a friend. When he arrived at his friend's house, Madrid, a stranger, opened the passenger side door, got in, pulled a knife on Dominguez and held it to his ribs. Madrid grabbed the keys from the ignition and told Dominguez to get out of the car and get in the back seat. Dominguez was afraid that Madrid would stab him. He ran away. Madrid drove away in Dominguez's car.

On March 17, 2007, a woman called police to report that Madrid had been involved in "a domestic incident" with her daughter. She said Madrid did not live there and he was refusing to leave. Police officer Jesse Magana arrived and saw Madrid standing near the door to the house. He approached Madrid and said, "Hey, can I talk to you?" Madrid responded, "Fuck you. I'm not talking to you."

Magana replied, "I just need to talk to you. The lady just wants you to leave. Can you please come out and talk?" Madrid responded, "Fuck you. You're going to have to come over here. You're not going to tell me what to fucking do." Magana did not want Madrid to enter the house. He believed that Madrid might have weapons inside. He asked Madrid, "How do you want to handle all this?" Madrid rolled up his sleeves, "made two fists," he then "took a fighting stance," and said,'"This is how I'm going to fucking handle this.'"

Police officer Cassandra Stowasser arrived, she pointed a Taser gun at Madrid and fired it. It hit Madrid, but it had no effect because Madrid removed the Taser barbs and wires. Magana warned Madrid that he was "going to tase" him. Madrid took a "boxing stance" and said, '"Those little TASER guns don't do anything to me. I like bullets.'" Magana fired the taser, but Madrid again removed the taser barbs and wires. He shouted to the officers, "Come on, mother-fuckers, bring it on. Is that all you have?"

Magana ordered Madrid to get on the ground and put his hands on top of his head. Madrid was belligerent and refused to comply. Madrid moved his hands behind his back. Magana believed that he might have a weapon. He ordered him to show his hands. When he did not comply, Magana struck him on his leg with a baton.

Madrid grabbed Magana around the waist, picked him up and pushed him into a wall. Magana testified, "We hit it hard. We bounced off of it." Madrid punched Magana and tried to throw him to the floor. He grabbed Magana's gun and tried to remove it from the holster. Stowasser, believing their lives were in danger, pulled her gun and shot and wounded Madrid.

Magana had several bruises and sustained a back injury as a result of his fight with Madrid.

DISCUSSION

I. Not Instructing on a Lesser Offense than Carjacking

Madrid contends the trial court erred by not instructing the jury on the lesser offense of vehicular grand theft. He claims jurors could have found that the car was not in Dominguez's "immediate presence" for carjacking, and had they been properly instructed, they could have found him guilty of only vehicular theft. We disagree.

A trial court must instruct "on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged." (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) "'Carjacking' is the felonious taking of a motor vehicle in the possession of another, from his or her person or *immediate presence* . . . against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force of fear." (§ 215, subd. (a), italics added.)

Madrid argues that the taking of the car did not occur in Dominguez's immediate presence. He states, "[T]he evidence established that Dominguez fled a substantial distance before [Madrid] moved the vehicle." But he interprets the phrase "immediate presence" too narrowly and omits the reason why Dominguez fled. Defendants are properly convicted of carjacking where they threaten the car owner forcing him or her away from the vehicle before they take it. (*People v. Coryell* (2003) 110 Cal.App.4th 1299, 1303.) The statute ""does not require that the victim be inside or touching the vehicle at the time of the taking."" (*Ibid.*)

Here Dominguez testified that he ran away from the car after Madrid got in, held a knife to his rib cage and ordered him to get into the back seat. He ran away because he was "scared." Because Dominguez was in the car when Madrid threatened him, the taking began within the victim's immediate presence. The evidence falls squarely within the carjacking statute. (*People v. Coryell, supra*, 110 Cal.App.4th at p. 1303.) Because "there is no evidence that the offense [Madrid committed] was less than" the charged offense, the court was not required to give a grand theft instruction. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 154.)

II. Not Instructing on Simple Assault on a Police Officer (§ 241, subd. (c))

Madrid claims there was substantial evidence that his use of force against Officer Magana was not likely to cause great bodily injury. He argues that the trial court erred by not instructing the jury sua sponte on simple assault against a police officer. (§ 241, subd. (c).) We disagree.

Madrid was convicted of assault with force likely to produce great bodily injury on a police officer, a felony. (§ 245, subd. (c).) The court instructed jurors that for a conviction of that offense they had to find, among other things, that " [t]he defendant did an act that by its nature would directly and probably result in the application of force to a person, and [¶] . . . *[t]he force used was likely to produce great bodily injury* . . . ." (Italics added.)

A defendant may be convicted of simple assault on a police officer where the force used was not likely to produce great bodily injury. (§ 241, subd. (c).) Section 241, subdivision (c) states, in relevant part, "When an assault is committed against the person of a peace officer, . . . and the person committing the offense knows or reasonably should know that the victim is a peace officer, . . . the assault is punishable by a fine not exceeding two thousand dollars ($2,000), or by imprisonment in the county jail not exceeding one year, or by both the fine and imprisonment."

The trial court did not instruct the jury on section 241, subdivision (c). Instead, it gave an instruction on the lesser-included offense of simple assault under section 240. The instruction provides, in relevant part, "To prove that the defendant is

guilty of this crime, the People must prove that: [¶] 1. The defendant did an act that by its nature would directly and probably result in the application of force to a person; [¶] 2. The defendant did that willfully; [¶] 3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone; [¶] 4. When the defendant acted, he had the present ability to apply force to a person; AND [¶] 5. The defendant did not act in self-defense."

Madrid claims that Officer Magana did not suffer serious injuries and consequently his offense falls outside the section 245 felony assault definition. But "[s]ection 245 'prohibits an assault by means of force *likely* to produce great bodily injury, not the use of force which does in fact produce such injury. While . . . the results of an assault are often highly probative of the amount of force used, they cannot be conclusive.'" (*People v. McDaniel* (2008) 159 Cal.App.4th 736, 748.) """The issue therefore is not whether serious injury was caused, but whether the force used was such that it would be likely to cause it.""" (*Ibid.*)

Here Madrid slammed Officer Magana into a wall. A forcible collision with such a hard surface is likely to cause great bodily injury. (*People v. Conley* (1952) 110 Cal.App.2d 731, 733, 737.) Magana testified, "We hit it hard. We bounced off of it." Madrid also punched Magana, grabbed him, lifted him and tried to throw him to the ground. These actions were likely to cause serious injuries. "The force likely to produce bodily injury can be found where the attack is made by use of hands or fists." (*People v. McDaniel*, *supra*, 159 Cal.App.4th at p. 748.) Moreover, the officers were in fear for their lives when Madrid grabbed Magana's gun. Stowasser testified that she shot Madrid because she believed he was going to use the gun to kill them. Madrid's attack was continuous and relentless. But for Stowasser's action, Madrid's "assault would have continued." (*Id.* at p. 749.) This offense does not fall within the simple assault category. (*Ibid.*)

But, even if the court had erred, any instructional error is harmless. There is no reasonable likelihood that the result would change had the court instructed the jury on

simple assault under section 241, subdivision (c). The court gave jurors the option of convicting Madrid of the lesser-included offense of simple assault under section 240. Simple misdemeanor assault under sections 240 and 241, subdivision (c) use the same standard regarding the force used to commit the offense. Neither section requires a finding that the force used was likely to produce great bodily injury. But the jury found Madrid guilty of felony assault under section 245. It necessarily determined that the force used met the felony standard because it was likely to produce great bodily injury. It rejected the misdemeanor simple assault option.

III. Substantial Evidence on Intent to Kill

Madrid contends that his conviction for attempted voluntary manslaughter must be reversed because there was no substantial evidence that he intended to kill police officers. We disagree.

In reviewing the sufficiency of the evidence, we draw all reasonable inferences in support of the judgment. We do not weigh the evidence or decide the credibility of witnesses. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 10-12.) Intent to kill is an element of the crime of attempted voluntary manslaughter. (*People v. Montes* (2003) 112 Cal.App.4th 1543, 1546-1547.) '"There is rarely direct evidence of a defendant's intent. Such intent must usually be derived from all the circumstances of the attempt, including the defendant's actions.'" (*People v. Smith* (2005) 37 Cal.4th 733, 736.)

When the officers approached Madrid, he "made two fists, took a fighting stance" and told them, "This is how I'm going to fucking handle this." When Officer Magana warned Madrid that he was ready to fire the Taser, Madrid responded, '"Those little TASER guns don't do anything to me. I like bullets.'" When Magana tried to subdue him, Madrid said, '"Fuck you. Is that all you got? Bring it on.'" Madrid grabbed Magana around his waist, picked him up and pushed him into a wall. He punched Magana and tried to throw him to the ground. Madrid then grabbed Magana's gun and attempted to pull it out of his holster. Magana testified that at that moment he was thinking, "I can't let him get my gun. I don't want to die today." Magana yelled, "He's got my gun."

Officer Stowasser shot Madrid. She testified that she had no choice because "our lives were in jeopardy." She said, "I was afraid that if he got control of the gun that he would try and kill one if not all of us." The evidence is sufficient.

IV. The Pitchess Motion

Madrid requests that we review the trial court chambers proceedings on his *Pitchess* motion (*Pitchess v. Superior Court*, *supra*. 11 Cal.3d 531) to determine whether the court erred when it ruled that no police personnel records should be disclosed to the defense. A *Pitchess* motion is a procedure for "screening law enforcement personnel files in camera for evidence that may be relevant to a criminal defendant's defense." (*People v. Mooc* (2001) 26 Cal.4th 1216, 1225.)

Madrid claimed that police records might disclose complaints against the officers who arrested him for excessive force and dishonesty. The trial court granted the motion and conduced an in camera proceeding. The custodian of the records testified. Following the in camera review, the court ruled, "There's nothing in the files that could possibly go to any defense in this case." We have reviewed the transcript of the in camera proceedings and conclude that the court did not abuse its discretion.

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

COFFEE, J.

PERREN, J.

Zel Canter, Judge

Superior Court County of Santa Barbara

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